No. _____

IN THE

Supreme Court of the United States

October Term, 1992

MARSHALL MARTIN, JR., On Behalf of Himself and all other Employees of the Ohio Turnpike Commission similarly situated, et al.,
Petitioners,

vs.

OHIO TURNPIKE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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November, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the authority of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), Rule 56 of the Federal Rules of Civil Procedure permits the Court of Appeals to weigh and to balance the evidence submitted in opposition to a motion for summary judgment and to thereby conclude, as a matter of law, that the Plaintiffs' lawsuit for compensation under the Fair Labor Standards Act must fail because of a finding that Plaintiffs have not met a standard of proof just announced as a matter of first impression, by the Court of Appeals for the Sixth Circuit.

2. Whether employees seeking compensation under the Fair Labor Standards Act for time spent "on-call" are entitled to a jury trial on the merits where the evidence shows, viewed in a light favorable to the employees (1) that no respite was afforded to

the employees from the duty to remain on-call, (2) that the employees were subject to discipline for failure to be immediately available to respond to the employer's summons to work, (3) that there was a significant degree of interruption of the employees' personal lives while on-call and (4) the on-call requirement was unilaterally imposed by the employer and without the consent of the employees.

LIST OF PARTIES

Petitioners[1] are a class numbering 125 past and present employees of Respondent,

---

[1] Marshall Martin, Jr., Larry D. Allen, Peter J. Bettura, Gary V. Clemons, Jeffrey M. Fees, Alan D. Fitzgerald, Frank Z. Guillard, Tom Harris, Richard J. Keshock, Charles L. Meier, James C. Metz, John A. Pavel, Frank J. Sofranko, John K. Adams, John Louis Arvai, Jr., Phillip A. Bailey, Willie Barbee, Gary L. Becks, Thomas J. Borawski, Gary Cain, Barthelo Cambarare, Robert W. Canter, Daniel J. Carson, Mark Childs, Gene Clawson, Gregory C. Danku, Gene DeCato, Paul R. Durst, Richard J. Eichler, Michael A. Everhart, Burdett L. Fisher Melvin J. Fousek, Jack L. Friend, John P. Gallagher, Kevin T. Garrity, Fred Gilkerson, Jeffrey D. Goff, Gary W. Greiner, Kenneth J. Hagenberger, Morton W. Harder, Frank C. Hawley, Peter J. Hayden, Gene J. Hendrickson, Taylor W. Horne, Edward P. Juristy, Rick Kelley, Don M. Kilbourn, Michael Kindel, Jerry W. King, Mark W. Kinzer, Dell Edward Kuchta, Bruno Kwasny, Blair Lydick, Michael A. Meeker, Danna A. Nottingham, Jack K. Peck, Stephen C. Rader, Robert J. Radich, Paul J. Smith, William J. Smith, Michael A. Spak, Guy Eric Steffens, Gerald A. Wagner, Paul B. Wagner, Walter Whitacre, Roy M. White, Dennis Woods, Robert J. Cook, John A. Day, Roger H. Deacon, Dale D. Flahan, Randy L. Hirsch, Thomas P. Isaman, Joseph George Kisela, Robert J. Mangina, Donald R. McCrea, Robert B. Owen, Jeffrey L. Ruse, James B. Sues, Brian Sullivan, Douglas E. Wanstreet, Leon R. Wanstreet, Randal L. Wilson, Harry W. Smith, Daniel L. Urig, Frank C. Martin, Jr., Mark A. Adams, Herbert D. Barnum, Clarence E. Behnken, Robert N. Bexten, Donald E. Bickham, Ronald Bidwell, Donald J. Borton, Harry R. Bradley, Larry A. Figgins, James L. Francis, Marion (Footnote continued on next page.)

Ohio Turnpike Commission. Petitioners and the Respondent are the only parties whom appeared in this action in the United States Court of Appeals for the Sixth Circuit.

(Footnote continued from previous page.)
T. Gilcher, Marcello Giuliano, Marlin F. Grimm, Alan Henry, Edwin L. Hinkle, William Horinek, Sr., Randall Jones, Donald A. Knepper, Daniel Koch, Edward J. Landsberger, Jeffrey A. Mackey, John D. Martin, Darwin E. Mucherman, Michael L. Myers, Lynn L. Parker, Timothy J. Pocock, Gary Powers, David A. Reeder, Lynn T. Roller, Kim R. Scarbrough, Harry E. Semer, Thomas E. Stokes, Sr., Franklin J. Storrow, Jeffrey A. Stryker, Allan Lee Unger, Terry F. Vinson, John L. Westfall, Richard J. Whitacre and Timothy A. Stefancik

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Marshall Martin, Jr., on behalf of himself and all other employees of the Ohio Turnpike Commission similarly situated, et al., hereby petitions the Court

to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on July 7, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is officially reported at 968 F.2d 606 and is printed in the Appendix at page A1.

The decision of the United States District Court for the Northern District of Ohio, Eastern Division is unreported and is printed in the Appendix at page A27.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 7, 1992. A Petition for Rehearing was denied by the Court of Appeals on August 20, 1992.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1) which allows for the issuance of a writ of certiorari to review a decision of the United States Court of Appeals.

STATUTES INVOLVED IN THE CASE

The instant case involves Section 7 of the Fair Labor Standards Act, 29 U.S.C. §207 (Appendix at page A56) and Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. §216(b) (Appendix at page A84).

STATEMENT OF THE CASE

This action was brought by Petitioners to recover compensation under Section 7 of the Fair Labor Standards Act[1] ("FLSA") for hours that they were required to be on-call and immediately available for work when summoned by their employer.

Petitioners are past and present maintenance employees of Respondent, Ohio Turnpike Commission ("Turnpike") who are responsible for providing road maintenance and emergency services, as needed, including snow removal, towing and traffic control at the scene of accidents. Petitioners were required to remain on-call and to be immediately available to report to the Turnpike for work during their non-scheduled work hours. Petitioners could excuse themselves from on-call duty

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[1] 29 U.S.C. §207; Appendix page A56 (hereinafter all references to the Appendix are designated as "Appx. p. A___").

only by taking vacation or by obtaining permission from the Turnpike.[2]

The Turnpike's system to summon an employee who is on-call involved placing three phone calls to the employee's residence at five minute intervals. If the employee answered the call, the employee was instructed to return to work immediately. If the employee failed to answer the call after the third phone attempt, then the employee was deemed unavailable for work and was disciplined.

The disciplinary scheme for violation of the on-call rule was unilaterally adopted by the Turnpike in January 1986. It provided for progressive discipline leading to discharge for five instances of unavailability during any one year period. From 1986 to

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[2]During their on-call duty, Petitioners were paid only for the time they were called back to the Turnpike to work. Otherwise, Petitioners did not receive any compensation for serving the mandatory on-call duty.

1989, there were sixty-nine recorded cases of discipline for unavailability for overtime work.

The threat of discipline for failing to answer a call from the Turnpike forced Petitioners to make significant alterations to their daily lives. Petitioners had to confine themselves to their homes so as not to risk being out of telephone contact for more than fifteen minutes at a time. As a result, Petitioners had to eliminate, or curtail participation in, a wide variety of social functions and leisure activities at and away from the home.

On June 22, 1987, Petitioners filed suit against the Turnpike in the United States District Court for the Northern District of Ohio to recover compensation under Section 7(a)(1) of the FLSA[3] for hours during which

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[3] 29 U.S.C. §207(a)(1); Appx. p. A56.

Petitioners were required to be on-call.[4] Petitioners alleged that their time spent on-call was "time worked" within the meaning of the FLSA because the time on-call was spent predominantly for the benefit of the Turnpike and not for Petitioners.

After months of discovery by both sides, the Turnpike moved for partial summary judgment on Petitioners' claim for compensation.[5] Petitioners opposed the Turnpike's motion with nearly one thousand pages of contravening evidence, including the affidavits of fourteen employees which detailed the numerous and substantial alterations which Petitioners made in their personal lives in

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[4]The jurisdiction of the District Court over the suit was based upon Section 16(b) of the FLSA, 29 U.S.C. 216(b). Appx. p. A84.

[5]The Turnpike limited its motion for summary judgment to that portion of Petitioners' claims relating to the period of time prior to March 11, 1989 (the date that a new collective bargaining agreement went into effect).

order to accommodate the needs of the Turnpike.[6]

On September 24, 1990, the District Court entered summary judgment in favor of the Turnpike on *all* claims made by Petitioners,[7] finding that "the facts of this case unequivocally demonstrate that the employees were waiting to be engaged and were not engaged to wait."[8] Petitioners appealed the decision of the District Court to the United States Court of Appeals for the Sixth Circuit. On July 7, 1991, the Court

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[6]Petitioners filed fourteen contravening affidavits consisting of 154 pages of material, 188 pages of answers to requests for admissions by the Turnpike (including exhibits) and the depositions of three Turnpike officials.

[7]The District Court ruling in favor of the Turnpike was also for claims after March 11, 1989, despite the fact that the Turnpike had not sought judgment after that date.

[8]Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division, filed September 24, 1990; Appx. p. A27, 51.

of Appeals, in a case of first impression, affirmed the entry of summary judgment.[9]

In reviewing the District Court's grant of summary judgment *de novo*, the Court of Appeals concluded that "on-call time spent at home may be compensable if the restrictions imposed are *so onerous* as to prevent employees from effectively using the time for personal pursuits."[10] Against that legal standard, the Court of Appeals concluded that the evidence submitted by Petitioners in opposition to the motion for summary judgment did not establish a genuine issue of material fact for trial.[11]

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[9] *Martin v. Ohio Turnpike Commission*, 968 F.2d 606 (6th Cir. 1992); Appx. p. A1, 2. The Court of Appeals remanded to the District Court that portion of Petitioners' claims relating to the period of time after March 11, 1989.

[10] *Id.*, 968 F.2d at 611; Appx. p. A20 (emphasis added).

[11] *Id.*, 968 F.2d at 611; Appx. p. A22.

In addressing the issue of the materiality of Petitioners' evidence, the Court of Appeals stated:[12]

> The fact that some of Plaintiffs' activities have been affected by the policy is not sufficient to make the on-call time compensable. The Plaintiffs must show that the policy is so onerous as to prevent them from effectively using their time for personal pursuits. That some of the Plaintiffs' personal activities may be affected is not enough. The Plaintiffs must establish the type of severe restrictions at issue in *Cross*[13] and *Renfro*[14].

The Court of Appeals made a factual finding that Petitioners, unlike the employees in *Cross*, had not provided "any evidence" to show how frequently they are called back to work.[15] The Court of Appeals made an

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[12] *Id.*, 968 F.2d at 611; Appx. p. A22-23.

[13] *Cross v. Arkansas Forestry Commission*, 938 F.2d 912 (8th Cir. 1991).

[14] *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, ____ U.S. ____, 112 S. Ct. 1310 (1992).

[15] *Martin*, 968 F.2d at 611; Appx. p. A23.

additional finding that Petitioners' private lives, in terms of travel, were not "severely restricted" because, unlike the situation in *Cross* and *Renfro*, "the Turnpike does not require its employees to arrive within a certain time after being called."[16]

Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Court of Appeals. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 20, 1992.[17]

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[16] *Id.*, 968 F.2d at 612; Appx. p. A23-24.

[17] Order filed August 20, 1992; Appx. p. A54.

REASONS FOR GRANTING THE WRIT

The Time Has Come for the Supreme Court to Clarify the Holding in *Anderson v. Liberty Lobby, Inc.* and to Rule That a Court Is Not to Weigh the Evidence in Deciding a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Court held that the role of the trial court, in ruling upon a motion for summary judgment, "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.*, 477 U.S. at 249. That case also directed trial courts, in determining the presence or absence of a genuine issue for trial to "bear in mind the actual quantum and quality of proof necessary to support liability" under the governing law. *Id.*, 477 U.S. at 254.

This verbiage raised serious concerns in the mind of Justice Brennan who, in his dissent, said that the majority's ruling which mandated consideration of the "quantum and

quality" of the proof required under the governing law "could surely be understood as an invitation -- if not an instruction -- to trial courts to assess and weigh evidence much as a juror would . . . ." *Anderson*, 477 U.S. at 266 (Brennan, J., dissenting). Since litigants' constitutional rights to trial by jury are at stake, a Rule 56 motion should not be used to weigh evidence and Justice Brennan pointed out the danger posed by the majority's opinion:

> I simply cannot square the direction that the Judge 'is not himself to weigh the evidence' with the direction that the Judge also bear in mind the 'quantum' of proof required and consider whether the evidence is of sufficient 'caliber or quantity' to meet that 'quantum.' I would have thought that a determination of the 'caliber and quantity', *i.e.*, the importance and value, of the evidence in light of the 'quantum', *i.e.*, amount 'required', could *only* be performed by weighing the evidence . . . . [I]f the Judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

Id., 477 U.S. at 266-67. Chief Justice Rehnquist, in his dissenting opinion, expressed a similar concern that the majority opinion in *Anderson* had left the trial courts and reviewing courts with little guidance as to how to proceed in ruling upon motions for summary judgment. *Anderson*, 477 U.S. at 272-73 (Rehnquist, J., dissenting).

The decision of the Court of Appeals in the instant case directly implicates the concerns articulated by Chief Justice Rehnquist and Justice Brennan. Here, the Court of Appeals determined, as a matter of law, that time on-call is compensable only if the restrictions imposed by the on-call policy are "so onerous as to prevent employees from effectively using the time for personal pursuits."[18] Then, having defined the "quantum and quality" of proof required to support

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[18] *Martin*, 968 F.2d at 611; Appx. p. A20.

liability, the Court of Appeals proceeded to weigh and balance Petitioners' evidence against what the members of the panel thought would be a sufficiently "burdensome" intrusion on Petitioners' private lives to withstand summary judgment and warrant trial by jury. In so doing, the Court of Appeals made a factual finding that the *quantity and quality* of the Petitioners' evidence was insufficient to meet the standard required for liability.

A further example of the improper weighing and balancing of the evidence in this case is found in the Sixth Circuit's factual finding that Petitioners could carry a paging device to satisfy the on-call obligation. Petitioners had submitted credible evidence that employees bore a substantial risk in using a pager. Petitioners' evidence would show that if a call from the Turnpike did not reach the employee using a

pager, through no fault of the employee, the employee would be disciplined. Rather than construing this evidence as raising a genuine issue for trial, the Court of Appeals for the Sixth Circuit concluded that bearing the risk of discipline for using a pager "does not amount to an interference with the employees' ability to use their free time."[19] *At a minimum*, the evidence submitted by Petitioners regarding the disputed use of pagers raised an issue of fact relating to the extent of the burden on the employees private lives by the on-call policy and it was error for the Court of Appeals to resolve such a factual dispute against the Petitioners in the context of summary judgment.

Aside from impermissibly weighing the evidence, the Court of Appeals also ignored

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[19] *Martin*, 968 F.2d at 612; Appx. p. A25.

evidence raising genuine issues of material fact.[20]

The Court of Appeals made a critical factual finding that Petitioners had not provided "any evidence" to show how frequently they were called back to work.[21] However, the Court of Appeals ignored the affidavit testimony of a Turnpike employee who swore that because of the on-call policy, he had been called back to work *four or five times per week*. Another employee swore that he was "*often*" called into work despite the lack of an emergency.

Moreover, the Court of Appeals' conclusion that Petitioners had not provided "any

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[20]Herein lies the other vice of allowing the District Court (or reviewing court) to weigh evidence. In the process it naturally follows that some evidence will be ignored or discounted. Petitioners believe that this is the province of the jury and not within the sweep of a Rule 56 ruling on summary judgment.

[21]*Martin*, 968 F.2d at 611; Appx. p. A23.

evidence" on the frequency of call back contradicts the finding by the court that employees had been disciplined by the Turnpike sixty-nine times for failing to respond to calls for overtime work. The Court of Appeals simply ignored the disciplinary records as evidence of the frequency of call back.

In addition, the Court of Appeals erred in finding, as a factual matter, that the Turnpike did not require Petitioners to arrive at work within a certain time after being called. This finding contradicts the finding made by the Court of Appeals that, when summoned by the Turnpike, the employees were expected to leave for work "*immediately.*" [22] In addition, the Court of Appeals ignored the affidavit testimony of a Turnpike employee who swore that the

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[22] *Id.*, 968 F.2d at 607; Appx. p. A4.

Turnpike required employees to arrive at their work stations within one hour of being called.

The erroneous factual findings that Petitioners failed to present evidence regarding the frequency of call backs and required response time is especially prejudicial to Petitioners in light of the Court of Appeals' suggestion that the *presence* of evidence of frequent call back would have been ground for overruling the Turnpike's motion for summary judgment. It is therefore appropriate for this Court to correct the injustice which has been done to the Petitioners as a result of the failure of the Court of Appeals to consider all of the relevant and material evidence presented by Petitioners as required by Rule 56 of the Federal Rules of Civil Procedure.

The instant case provides an appropriate vehicle for the Supreme Court to revisit the

holding in *Anderson v. Liberty Lobby* and to thereby reverse the injustice which has occurred here. The Court should take this opportunity to give instruction to the lower courts that in ruling upon motions for summary judgment, they are only to determine *whether* a genuine issue of fact exists for trial, and that the courts are not to weigh the evidence to determine whether the non-movant's evidence is of a sufficient quantity and quality to support liability under the governing law.

It Is Time for the Supreme Court to Provide Definitive Guidance on This Area of Law Because the Court Has Not Spoken in Almost Fifty Years and the Courts of Appeal Are in Conflict.

This Court ruled forty-eight years ago in the companion cases of *Armour & Co. v. Wantock*[23] and *Skidmore v. Swift & Co.*[24] that time spent waiting for work is compensable under the Fair Labor Standards Act if the waiting time is spent *predominately* for the benefit of the employer.[25]

In those rulings, the Court declined to announce a strict legal formula for determining whether waiting time is spent predominately for the benefit of the employer. Instead, the Court noted that "[w]hether in a concrete case such time falls within or without the Act *is a question of fact* to be

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[23] 323 U.S. 126 (1944).

[24] 323 U.S. 134 (1944).

[25] *Armour*, 323 U.S. at 133; *Skidmore*, 323 U.S. at 136-37.

resolved by appropriate findings of the trial court." *Skidmore*, 323 U.S. at 136-37 (1944) (emphasis added). The Court directed that the following factors be considered to determine whether the time on-call was time worked:

(a) the agreement between the parties;

(b) the nature and extent of the restrictions on the employee's use of the time;

(c) the relationship between the nature of the service and the on-call time; and

(d) all other surrounding circumstances.

Skidmore, 323 U.S. at 137. Despite the clear admonition in *Armour* and *Skidmore*, that these cases are fact intensive, the merits are now being decided in the lower courts upon motion for summary judgment with an alarming frequency.

In just the past two years, the Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh

Circuits have all disposed of this type of case in the context of a summary judgment proceeding.[26] In the process, the Circuit Courts have departed from unequivocal Supreme Court precedent that each case must be considered on its own set of facts.

The instant case gives the Supreme Court the opportunity to resolve the present conflicts among the Circuits and to lay down a fair rule to apply in cases, such as this, where employees are kept in a state of constant readiness to serve the employer and:

(1) no respite is offered from the on-call obligation and

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[26] *Owens v. Local No. 169, Association of Western Pulp and Paper Workers*, 971 F.2d 347 (9th Cir. 1992); *Birdwell v. City of Gadsden*, 970 F.2d 802 (11th Cir. 1992); *Martin v. Ohio Turnpike Commission*, 968 F.2d 606 (6th Cir. 1992); *Bright v. Houston Northwest Medical Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991) (*en banc*), *cert. denied*, ____ U.S. ____, 112 S. Ct. 882 (1992); *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, ____ U.S. ____, 112 S. Ct. 1310 (1992); *Cross v. Arkansas Forestry Commission*, 938 F.2d 912 (8th Cir. 1991).

(2) discipline is imposed for failure to respond to a call to work and

(3) there is a significant degree of interruption of employee's use of off-duty time, though less than total.

All of the above factors are present in the instant case, however, the Court of Appeals ignored these factual elements. Instead, the Court of Appeals for the Sixth Circuit aligned itself with the Fifth Circuit decision in *Bright v. Houston Northwest Medical Center Survivor, Inc.*[27] which holds, in essence, that an employee cannot resist a motion for summary judgment unless the employee establishes a *total preclusion* of the opportunity to engage in personal pursuits while on-call. This "total preclusion" concept looks entirely at whether or not the time served on-call is "pleasurably spent." This "all

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[27] 934 F.2d 671 (5th Cir. 1991) (*en banc*), *cert. denied*, ____ U.S. ____, 112 S. Ct. 882 (1992).

or nothing" test was squarely rejected in *Armour* and *Skidmore*.

The *Skidmore* decision made clear that the issue in determining whether time spent on-call is time worked is not whether the employee's time is pleasurably spent, but whether the employee can spend the time doing what the employee would choose to do *had he been free to chose*. *Skidmore*, 323 U.S. at 139. Thus, under *Skidmore*, if the employee cannot reject the environment imposed by the employer, whether pleasurable or not, the requirement to do as the employer directs is time worked and is therefore compensable under the FLSA.

However, under the "total preclusion" rule adopted by the Fifth and Sixth Circuits, an employer need not compensate employees for time spent on-call so long as the employees may engage in *any* personal activities, however limited, which are for the employee's benefit. Thus, if the employee

can watch television, or read a book while on-call, the time is not compensable since those activities are for the benefit of the employee. This type of result was squarely rejected in *Armour* and *Skidmore*.

Moreover, the law has developed in the intervening forty-eight years since *Armour* and *Skidmore* into a tacit recognition that there are two kinds of on-call cases: those in which the employees are afforded a respite period from the on-call obligation, and those in which the employees are not afforded a respite period.

It is appropriate, given the development of the law since *Armour* and *Skidmore*, for this Court to rule on this factual distinction in order to provide guidance for trial courts and litigants.

The Sixth Circuit Court of Appeals has interpreted the cases of *Renfro v. City of*

Emporia[28] and *Cross v. Arkansas Forestry Commission*[29] as setting forth the minimal factual elements necessary to resist summary judgment. It is simply plain error for the Court of Appeals to cite *Renfro* as having any bearing on this case. In *Cross* (like the instant case) there was *no respite* from the on-call obligation. That is, there was no period of time during which the employees were actually off-duty and not subject to call. *Renfro*, on the other hand (quite unlike the instant case) involved a respite from the on-call policy.

The notion of "frequency of call back" as being an important element of whether time spent on-call is time worked is deceiving, unless it is measured against the duration of the duty period of being on-call.

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[28] 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, ____ U.S. ____, 112 S. Ct. 1310 (1992).

[29] 938 F.2d 912 (8th Cir. 1991).

If an employee is required to be on-call for sixteen consecutive hours (as in the instant case) and to remain in a constant state of readiness to serve upon receipt of a phone call from the employer, it makes no difference how frequently the employee is actually called back to work -- the burden upon the employee is the physical restriction of being held hostage to the telephone because the employee is thereby precluded from a wide range of social and leisure activities away from a telephone.

Here, however, the Sixth Circuit misapplied the holding in *Cross* by requiring proof that the employees were *entirely precluded* from engaging in personal pursuits while on-call. The notion of "total preclusion" might make some sense in the situation where the on-call obligation is of short duration. However, that is simply not the case here. The Supreme Court should therefore

take this opportunity to clarify the distinction between the respite/no-respite type cases for the guidance of both trial courts and litigants.

Another reason that this case warrants close scrutiny by the Supreme Court is because, unlike most other reported cases, here discipline has been imposed by the employer for violation of the on-call policy. The imposition of discipline injects an element of coercion into the employment relationship which is not present where discipline is the subject of bargaining or even disclosure, prior to hire. This element of coercion, standing alone, bears directly upon the issue of the restrictiveness of the on-call obligation and should be considered material to the issue of whether the time spent on-call is spent predominately for the benefit of the employer.

Thus, for the reasons set forth above, it is appropriate for this Court to update and clarify its prior rulings in *Skidmore* and *Armour* to give guidance to the lower courts and litigants on these type of cases.

CONCLUSION

For the foregoing reasons, Petitioners request that the Court issue a writ of certiorari and order that the instant case be briefed and argued to the Court on the merits.

Respectfully submitted,

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APPENDIX

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 7, 1992)

Nos. 91-3807/3838

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARSHALL MARTIN, JR., On Behalf of Himself and all other Employees of the Ohio Turnpike Commission similarly situated, et al.,
Plaintiffs-Appellants,

v.

ON APPEAL from the United States District Court for the Northern District of Ohio

OHIO TURNPIKE COMMISSION,
Defendant-Appellee.

Decided and Filed July 7, 1992

Before: GUY and BOGGS, Circuit Judges; and RONEY, Senior Circuit Judge*.

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*Honorable Paul H. Roney, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

PER CURIAM. The plaintiffs, a group of highway maintenance workers, brought this action under the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, to obtain overtime compensation for time that they were "on call" while away from the worksite. The district court granted summary judgment to the defendant employer. We affirm.

I.

The plaintiffs are 125 highway maintenance workers employed by the defendant, the Ohio Turnpike Commission (Turnpike). The Turnpike employs approximately 300 maintenance workers, each assigned to one of eight maintenance buildings situated along the highway. Each employee works an eight-hour shift five days a week. The shift starts at 8:00 a.m. during the winter and 7:00 a.m. during the summer.

The Turnpike requires the employees to work overtime as needed and pays one and

one-half times the regular hourly rate for overtime work. The Turnpike schedules much of the overtime work in advance. Unscheduled overtime work becomes necessary when an emergency, such as an accident or severe weather, occurs after normal working hours.

Before 1986, employees could exempt themselves from unscheduled overtime work. Under a new collective bargaining agreement that went into effect in 1986, the Turnpike required employees to perform unscheduled overtime work when called. Employees could excuse themselves from unscheduled overtime only by taking a vacation day or by obtaining permission from the foreman in advance. The parties disagree as to whether the foremen readily granted such permission.

The Turnpike developed a procedure for summoning workers for emergency overtime work. The Turnpike divided workers into two crews. One crew would be "on" and the other

crew would be "off" at all times.[1] When an emergency occurred, the foreman would determine how many workers were needed. The custodian would then call employees from the "on" crew, beginning with the employee who had worked the least number of overtime hours to date. The custodian would summon employees from the "off" crew only if the "on" crew could not provide sufficient manpower.

The custodian would attempt to call each employee three times at five-minute intervals. If the employee answered the call, the custodian would ask the employee to leave for work immediately. If an employee failed to answer by the third attempt or refused to report, the custodian would call the next name on the roster.

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[1]During the winter, the two crews alternated every 12 hours during a storm. During the summer, a crew was "on" for two weeks and "off" for two weeks.

Employees could take certain steps to reduce the chances of missing a call for emergency work. First, an employee could call the Turnpike collect and leave a number where he or she could be reached. Second, if someone remained at the employee's home, the employee could tell that person how to contact him or her in the event of an emergency. Third, an employee could call the foreman and ask whether he or she was likely to be needed for emergency work that night. Fourth, an employee could consult the overtime roster and the "on" and "off" rotation scheduled to determine whether he or she would be among the first to be called in the event of an emergency. Fifth, the employee could carry an electronic pager.[2]

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[2]The parties disagree as to whether some of these measures were effective. The plaintiffs point out that employees acted at their peril if they concluded that they would not be called based on the overtime roster or on a foreman's prediction. The plaintiffs also maintain that the Turnpike actively discouraged the use of pagers.

If an employee was in the "on" crew and failed to answer a call or refused to report, he or she would be subject to discipline. The Turnpike did not take disciplinary action against any employees in the "off" crew who failed to answer a call. Two instances of discipline within one year would result in a written reprimand. The third and fourth occurrences would lead to suspensions, and a fifth would result in termination. From 1986 to 1989, the Turnpike took disciplinary action 69 times but apparently did not terminate any employees under the policy.

When an employee performed unscheduled overtime work, he or she received overtime compensation for travel time to and from the Turnpike as well as for the time actually worked. The Turnpike did not compensate employees, however, for time spent "on call" away from the Turnpike.

Fourteen of the plaintiffs filed this action in June 1987 for overtime compensation for time spent on call. The district court ordered the plaintiffs to issue an "opt-in" notice, pursuant to 29 U.S.C. §216(b), to notify other Turnpike employees of the action. Over 100 employees responded to the notice, and an amended complaint was filed to add the new plaintiffs. In August 1988, the plaintiffs filed a second amended complaint, adding a claim for compensation for time spent on call during lunch breaks taken on the Turnpike's property (the "lunch period" claim).

Five months later, the Turnpike moved for partial summary judgment against the plaintiffs' first claim. The Turnpike filed a notice in May 1989 limiting the summary judgment motion to the period before March 11, 1989, the date a new collective bargaining agreement went into effect.

The district court granted the Turnpike's motion for partial summary judgment in September 1990. In March 1991, the plaintiffs moved for reconsideration and for a clarification of whether the partial summary judgment order was limited to the period before March 11, 1989. The court denied the plaintiffs' motions for reconsideration and clarification and explained that it had granted summary judgment against the first count "in its entirety."

In August 1991, the plaintiffs voluntarily dismissed the "lunch period" claim. The district court then entered an order certifying the grant of partial summary judgment as a final order. This appeal followed.[3]

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[3]The plaintiffs filed two notices of appeal. The first appealed from the order granting partial summary judgment and the orders denying the motions to reconsider and clarify. The second notice appealed from those three orders and the order certifying the partial summary judgment as a final order. We consolidated the plaintiffs' two appeals.

II.

Summary judgment is appropriate if, after an opportunity for discovery, the moving party demonstrates that there is no genuine issue of material fact as to the existence of an element essential to the non-moving party's case and on which the non-moving party would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party carries its initial burden of showing that no genuine issues of material fact are in dispute, the burden shifts to the non-moving party to come forward with specific facts to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To establish a genuine issue as to the existence of a particular element, the non-moving party must point to evidence in the record upon which a

reasonable jury could find for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The genuine issue must also be material; that is, it must involve facts that might affect the outcome of the suit under the governing law. *Id.* When determining whether there is a genuine issue of material fact, a court must view the evidence in the light most favorable to the non-moving party. *Id.* at 255. We review the district court's grant of summary judgment *de novo*. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990).

A.

We begin our analysis by examining the law applicable to the plaintiffs' claim. The Fair Labor Standards Act (FLSA) provides that employees must be compensated at one and one-half times their regular rate for overtime work. 29 U.S.C. §207(a). Although

the FLSA does not state whether time spent on call is working time, the Supreme Court has held that, under some circumstances, waiting time is compensable. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944).

In both *Armour* and *Skidmore*, the plaintiffs were private firefighters hired to work at the defendants' factories. In both cases, the plaintiffs worked regular hours, but were required to spend approximately half of their "time off" in the company dormitories so that they could respond quickly to alarms. In *Armour*, the Seventh Circuit had upheld a finding in favor of the firefighters, but in *Skidmore* the district court and the Fifth Circuit had held that waiting time was not compensable.

The Court declined to issue a firm rule as to whether on-call time is working time.

Instead, the Court held that the result turns on whether an employee's time "is spent predominantly for the employer's benefit or for the employee's," a question "dependent upon all the circumstances of the case." *Armour*, 323 U.S. at 133; *see also Skidmore*, 323 U.S. at 136-37. The Court affirmed the judgment for the firefighters in *Armour* and reversed and remanded in *Skidmore* for a determination as to whether, considering the facts in that case, the firefighters' waiting time was compensable.

Although the employers' requirement that the employees spend their "time off" in the employers' dormitories was an important factor in both *Armour* and *Skidmore*, the Court did not limit its holding to waiting time spent on company premises. Therefore, an employee may be entitled to compensation even though he or she is on call at home or

elsewhere.[4] Although we have not decided such a case before today, at least three other circuits have considered claims for compensation for time spent on call while away from the employer's premises. Since the Court emphasized in *Skidmore* and *Armour* that the outcome in each case depends on the specific circumstances, we shall examine the facts in these other cases in some detail.

The Turnpike relies on several cases in which the Fifth Circuit has rejected employees' claims for off-premises, on-call overtime. In *Bright v. Houston Northwest Medical*

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[4] Conversely, an employee may not be entitled to compensation even though the employer does require the employee to wait on company premises. *See, e.g., Kelly v. Hines-Rinaldi Funeral Home*, 847 F.2d 147, 148 (4th Cir. 1988) (affirming summary judgment against housekeeper's claim for compensation for nights primarily spent sleeping in apartment inside funeral home), *cert. denied*, 493 U.S. 835 (1989); *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248-49 (5th Cir. 1986) (affirming dismissal of offshore oil workers' claim for compensation for time primarily spent sleeping and relaxing on employer's barge), *cert. denied*, 484 U.S. 827 (1987).

Center Survivor, Inc., 934 F.2d 671 (5th Cir. 1991), *cert. denied*, ____, U.S. ____, 112 S. Ct. 882 (1992), the Fifth Circuit, sitting *en banc*, affirmed a grant of summary judgment against a biomedical repair technician who was on call 24 hours a day, 365 days a year. While off duty, his employer required him to remain sober, carry a pager at all times, and be able to arrive at work within approximately 20 minutes. The employer paged him an average of four to five times a week. The court concluded that, although these conditions were oppressive, the fact that the technician could use the time for his own pursuits so long as he stayed near the hospital precluded compensation under the FLSA. *Bright*, 934 F.2d at 678-79.

Similarly, in *Halferty v. Pulse Drug Co.*, 864 F.2d 1185 (5th Cir. 1989), the court reversed a judgment obtained by an ambulance dispatcher who was required to remain at

home to answer calls from 5:00 p.m. to 8:00 a.m. The court held that she was not entitled to compensation because she was free to "visit friends, entertain guests, sleep, watch television, do laundry, and babysit." *Id.* at 1189. The Fifth Circuit also reversed a judgment in favor of on-call employees in *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369 (5th Cir. 1987). The employees in that case rotated the duty to stay home and answer alarm calls from the employer's pumping station. The court, noting that the alarms were infrequent, concluded that the employees were "relatively free to use on-call time however they desire." *Id.* at 373.

The plaintiffs in this case concede that their claim would not succeed in the Fifth Circuit. They maintain, however, that the Fifth Circuit has adopted an overly restrictive view of on-call compensation.

The plaintiffs contend that their claim would succeed under the approach taken by the Eighth and Tenth Circuits. In *Cross v. Akransas Forestry Commission*, 938 F.2d 912 (8th Cir. 1991), the employer required its employees to monitor hand-held radios 24 hours a day during on-call periods and respond immediately to emergencies. The court found that this requirement restricted the employees' travel, prevented them from participating in activities that would prevent them from hearing the radio, forced them to concentrate on the radio at all hours, and prevented them from going places, such as theaters, where radio noise is unwelcome. *Id.* at 916-17. Accordingly, the court reversed the district court's grant of summary judgment against the employees' claim for compensation and remanded the case for trial.

The Tenth Circuit affirmed a grant of summary judgment in favor of an employees'

claim for compensation for on-call time in *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, ____ U.S. _____, 112 S. Ct. 1310 (1992). In *Renfro*, the plaintiff firefighters were on call for 24-hour periods, during which they were required to carry pagers and return to work within 20 minutes when called. The court, placing heavy emphasis on the undisputed fact that the employer called back each firefighter an average of three to five times per 24-hour period, concluded that the firefighters could not use the time effectively for personal pursuits. *Renfro*, 948 F.2d at 1535.

The *Renfro* court distinguished two earlier Tenth Circuit cases. In *Boehm v. Kansas City Power and Light Co.*, 868 F.2d 1182 (10th Cir. 1989), the court held that the trial court should have directed a verdict against the plaintiff linemen's claim for on-call

compensation. The policy challenged in *Boehm* required the linemen to respond to one-third of callback requests and allowed the linemen to carry pagers or leave alternative telephone numbers. In *Norton v. Worthen Van Service, Inc.*, 839 F.2d 653 (10th Cir. 1988), the employer required van drivers to answer calls to transport railroad crews. The court affirmed the district court's dismissal of the drivers' claim for on-call compensation, finding that the drivers were free to pursue personal pursuits and use a pager if they needed to be away from a telephone. *Id.* at 655-56.

The plaintiffs also point to the unpublished decision in *Owens v. ITT Rayonier*, No. C88-533T (W.D. Wash. Sept. 26, 1990), *appeal docketed*, No. 91-35409 (9th Cir. 1991). In *Owens*, the court entered judgment against a pulp mill that promulgated a policy that imposed discipline against any mechanic who

missed an unspecified number of call-in attempts. The court concluded that the mechanics' obligation to respond to pages prevented them from using the time for their own purposes. As the Turnpike points out, the *Owens* decision cites no cases and contains no legal analysis to support its decision.

Finally, the Department of Labor, the executive department charged with administering the FLSA, has promulgated regulations concerning the compensability of on-call periods The regulations provide:

> An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the

> night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

29 C.F.R. §553.221(d); *see also* 29 C.F.R. §785.17 (containing virtually identical language). The Department of Labor's interpretation of the FLSA is entitled to deference. *Skidmore*, 323 U.S. at 139-40.

From our survey of the law in this area, we conclude that on-call time spent at home may be compensable if the restrictions imposed are so onerous as to prevent employees from effectively using the time for personal pursuits. The mere fact that an employer requires employees to leave word where they can be reached will not be sufficient to make the on-call time compensable. Instead, the employees must show that the on-call policy imposes additional burdens that

seriously interfere with their ability to use the time for personal pursuits.

For example, the employees may be able to show, like the employees in *Renfro*, that the employer calls them back so frequently as to make effective use of the time impractical. Alternatively, the employees could show, like the plaintiffs in *Cross*, that the employer's on-call system is so distracting or cumbersome as to seriously inhibit personal activities. We do not hold that these two examples are the only ways that employees could meet their burden, but we do find them to be representative of the type of showing that an employee must make to survive a motion for summary judgment.

B.

We now must determine whether the plaintiffs' evidence in the instant case is sufficient to survive summary judgment. The plaintiffs contend that the district court

erred by resolving disputed issues of fact in favor of the Turnpike. Specifically, the plaintiffs argue that the district court erroneously concluded that the on-call policy has not changed the plaintiffs' lifestyles.

We agree that the plaintiffs' affidavits and depositions are sufficient to establish an issue as to whether the on-call policy has changed the plaintiffs' use of their free time. Viewing that evidence in the light most favorable to the plaintiffs, a reasonable juror could find that many of the plaintiffs have given up or curtailed certain activities for fear of missing an emergency call.

However, we find that the plaintiffs' evidence does not establish a genuine issue of *material* fact. The fact that some of the plaintiffs' activities have been affected by the policy is not sufficient to make the on-call time compensable. The plaintiffs

must show that the policy is so onerous as to prevent them from effectively using their free time for personal pursuits. That some of the plaintiffs' personal activities may be affected is not enough. The plaintiffs must establish the type of severe restrictions at issue in *Cross* and *Renfro*.

The plaintiffs have not provided any evidence to show how frequently they are called back. Without such evidence, a jury could not find that they are called back so frequently as to make effective use of their time impractical. The plaintiffs also have not established that the Turnpike's on-call system is unusually onerous. Unlike the employees in *Cross*, the plaintiffs need not listen to a radio all night. They need only respond to a telephone call or pager. If they need to leave home, they can call the Turnpike and give a number where they can be reached. Unlike the employers in *Cross*,

Renfro, *Bright* and several of the other on-call cases, the Turnpike does not require its employees to arrive within a certain time after being called.[5] Thus, the plaintiffs' travel is not severely restricted.

The plaintiffs argue that several facts in the record establish that the Turnpike's policy is unreasonable. For example, the plaintiffs point to the testimony of a Turnpike official, who stated that, due to the possibility of malfunction, employees used pagers at their own risk. That official also testified that the Turnpike may not have allowed an employee to leave more than one alternate phone number where he or she could be reached.

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[5]If the custodian calls an employee and learns that he or she is too distant to arrive in time to help with the emergency, the custodian will call another employee. There is no indication in the record that the Turnpike would discipline the first worker in that situation.

This evidence does not establish that the Turnpike's on-call policy was especially burdensome. The fact that employees bore the risk of using pagers does not amount to an interference with the employees' ability to use their free time. Similarly, the restriction on the number of alternate phone numbers merely requires an employee to call in each time he or she changes location.

Finally, although the plaintiffs stated in their affidavits and depositions that they have given up certain activities, we note that many of them admitted that they still participate in numerous activities. Those admissions would preclude a finding that the plaintiffs are unable to use their time for their own pursuits. We therefore find that summary judgment against the plaintiffs' claim is appropriate.

C.

Finally, we must consider whether the district court properly granted summary

judgment against the plaintiffs' claim in its entirety. The Turnpike had limited its motion for summary judgment to the period before March 11, 1989, the date a new collective bargaining agreement went into effect. The new agreement changed some of the features of the on-call policy.

At oral argument, the Turnpike conceded that the grant of summary judgment covered only the period before March 11, 1989. Accordingly, the portion of the plaintiffs' claim pertaining to the period after the date is **REMANDED** to the district court for further proceedings.

In all other respects, the judgment of the district court is **AFFIRMED**.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

(Filed September 24, 1990)

MARSHALL MARTIN,	)	CASE NO. C87-1548
	)	
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM AND ORDER
	)	
OHIO TURNPIKE ASSOCIATION,	)	
	)	
Defendant.	)	

ALDRICH, J.

This is an action brought by 126 maintenance employees ("employees") of the defendant Ohio Turnpike Commission ("Turnpike") to recover back pay for time spent "on-call", beginning on June 22, 1984.[1]

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[1]The employees amended their complaint in August 1988 to add the following claim: "In addition, from June 22, 1984 to on or about January 1, 1986, Plaintiffs were required to be, and were 'on-call' during a twenty minute lunch period on each scheduled work day to respond to emergencies and no pay was given for such hours to the employees." (Complaint at 11). Whether these periods are compensable is a factual issue governed by Hill v. United States, 751 F.2d 810 (6th Cir. 1984). The Turnpike's present motion is not directed towards this claim.

The employees' action is brought pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 et. seq. The Turnpike has moved for partial summary judgment as to the employees' claim for back pay for on-call time up to March 11, 1989 at which time the Turnpike and the employees' union entered into a new collective bargaining agreement ("CBA"). For the reasons stated, the Court grants the Turnpike's motion for partial summary judgment.

I.

The undisputed facts are as follows. The employees are 126 maintenance workers who are employed by the Turnpike, a 241-mile highway. For administrative purposes, the highway is divided into two divisions each consisting of four maintenance buildings which are approximately thirty miles apart. The personnel of each maintenance building

are responsible for maintaining a particular section of the Turnpike. Each maintenance building houses approximately 30 employees at a time, for a total of about 240 maintenance employees. Additionally, there are sign shop and division headquarter's employees.

Maintenance employees work an eight hour shift five days per week for which they are paid a straight time rate which on average is $11.03 per hour. They are also expected, as a condition of employment, to work scheduled and unscheduled overtime.

The terms and conditions of employment are governed by the CBA which was effective from January 1, 1986 through January 1, 1989. With respect to the maintenance workers, the collective bargaining agreement provided:

> 3.1 Every effort will be made to keep overtime work to a minimum. However it is only reasonable to

anticipate that from time to time circumstances will necessitate overtime work.

3.2 All employees in the designated unit shall be entitled to pay for overtime hours worked, at the rate of one and one-half (1-1/2) times their regular hourly wage.

3.6 If the work week of a maintenance employee who is regularly scheduled to work Monday through Friday is temporarily rescheduled to include Saturday and Sunday, the Saturdays and Sundays will be at overtime pay.

3.9 All hours worked in any one (1) work week by an employee in excess of the total standard, regularly scheduled, straight-time hours for work week, shall be considered to be overtime hours.

3.10 Overtime work being of paramount importance in the operation and maintenance of the Turnpike, all employees shall work overtime when required to do so by their supervisors.

3.12 For this purpose [equalization of overtime] an overtime roster shall be kept and shall be posted in a conspicuous location at each maintenance building and each toll plaza. . . .

3.17 Unless approved or excused by supervisory personnel for good cause, refusal of or unavailability

> for overtime work shall be deemed sufficient cause for disciplinary action including dismissal. The disciplinary action taken will be determined by taking into consideration the reasons for the refusal to perform overtime and if the employee is unavailable because of prior commitment such as a doctor or dentist appointment, no disciplinary action will be taken.

The CBA contains a grievance procedure that employees may utilize if they believe that the imposition of discipline was not proper.

On July 15, 1986, G. Alan Plain, Deputy Executive Director issued a memorandum to all maintenance employees to clarify the Turnpike's policy on refusal of or unavailability for overtime work. The memorandum provides that employees will be disciplined each time they either are unavailable for work or refuse overtime. Discipline would be applied progressively and in determining the number of occurrences, the records would be examined from the date of the occurrence

going back one year. The schedule for discipline is as follows:

(1) first occurrence -- verbal warning;

(2) second occurrence -- written reprimand;

(3) third occurrence -- one-day suspension;

(4) fourth occurrence -- 3-day suspension; and

(5) fifth occurrence -- termination.

The Turnpike does not require by written policy that employees make themselves available for overtime in any particular way. An employee may leave a beeper number, call collect, or leave alternative telephone numbers. However, if the Turnpike is unable to reach an employee, even using these alternative methods, the employee will be considered unavailable for overtime.

The Turnpike calls employees for overtime first by crew division. At each maintenance building there is an A and a B crew. Each crew is first up for overtime for a two

week period and then the other crew is first up for two weeks. Within each crew, the employee with the least amount of overtime is called first and so on. The assignments and lists are posted so that each employee knows when he is most likely to be called for overtime.

The maintenance superintendent, Dale Sturdevant, stated that in order to be excused in advance from being on-call, the employee must present a bona fide reason or good cause. Generally, an employee is excused for activities such as medical appointments, illness, or death in the family. Requests to be excused for activities such as travel, fishing or family reunions are viewed less favorably and are granted in the discretion of the foreman, if he feels he has adequate staffing otherwise.

When an employee is needed for overtime work, the employee is contacted by telephone

by the "custodian." The custodian is instructed to try to reach the employee at five minute intervals and to make three such calls. If no contact is made with the employee within that time, the employee is then considered unavailable for overtime work.

All the plaintiff employees submitted admissions that they engaged in activities at and away from homes that were for their, and not the Turnpike's, benefit. These admissions covered the time period from January 1, 1984 until the date upon which they were answered in 1988.

The employees have submitted affidavits of 14 employees whose depositions were taken by the Turnpike. These 14 employees state that their deposition testimony reflected their activities before the change in Turnpike policy in July 1986. In their affidavits, they all state that since the

change in disciplinary policy they have curtailed their activities and no longer take weekend camping trips, go fishing, participate in league sports, or attend church and family reunions. However, they do spend their time watching television, entertaining at home, watching moves, reading, gardening, and so on.

Discipline has been imposed 69 times from 1986-89 for the group of 302 Turnpike employees. Of these 69 instances, 45 represent multiple infractions by only 17 of those 302 employees. Based on the overtime policy, 31 employees have been disciplined[2]

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[2]The employees discuss a select few instances of discipline as applied to individuals. However, the Turnpike has submitted evidence showing that at least some individuals who grieved their discipline, were successful in having the discipline stricken. Thus, without more, these isolated incidents of discipline fail to show any particular policy which would be relevant to deciding the issue before the Court. The employees also discuss the discipline given to Mark Childs in 1981 for driving while intoxicated but not while at work. That instance has no relevance to the question presented in this lawsuit.

over a three year period.

II.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...

The nature of materials properly presented in a summary judgment pleading is set forth in Federal Criminal Rule of Civil Procedure 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When

> a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions to file. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of

material fact exists. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Hanson v. CleveTrust Realty Investors, Inc., 729 F.2d 372 (6th Cir. 1984). A fact is "material" only if its resolution will affect the outcome of the lawsuit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil trials the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." Id. at 252. Although "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient to defeat a summary judgment motion, the court is not precluded from denying a summary judgment motion where it concludes that proceeding to trial is a better course. Id. at 252, 254.

III.

FLSA provides as follows:

> (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed

29 U.S.C. §207. FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. §203(g). The act does not define work but leaves that determination to the courts. "Work includes 'physical or mental exertion' for the employer's benefit, see Tennessee Coal, Iron & Railroad Co. v. Muscodea Local 123, 321 U.S. 590, 598 ...(1944), as well as stand-by or waiting time, Armour & Co. v. Wantock, 323 U.S. 126...(1944); Skidmore v. Swift & Co., 323 U.S. 134...(1944)." Hill v. United States, 751 F.2d 810, 812 (6th

Cir. 1984), cert. denied, Cummings v. United States, 474 U.S. 817 (1985).

The crucial question then is "whether the employee was 'engaged to wait' or 'waiting to be engaged.'" Brock v. El Paso Natural Gas Co., 826 F.2d 369, 372 (5th Cir. 1987) (citing Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944)). Because each case presents such varied facts, the Supreme Court declined to lay down a legal formula. Id. at 136-37.

The inquiry into compensability of "on-call" time

> involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service and its relation to the waiting time, and all the surrounding circumstances. . . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.

Skidmore, 323 U.S. at 137. In both Skidmore and its companion case Armour & Co. v. Wantock, 322 U.S. 127 (1944), the Supreme Court found that time spent by private firemen, on the employer's premises, waiting for alarms, was compensable under FLSA.

The Sixth Circuit most recently addressed the issue of compensability under FLSA in a case involving a postal carrier's meal time. Hill, 751 F.2d 810. The court found that the meal time was not compensable because "he was not required to perform any duties which could be characterized as substantial duties." Id. at 814. The Sixth Circuit has not addressed FLSA in the context of "on-call" or waiting time.

The Fifth Circuit, however, has frequently addressed the issue. In 1986, the Fifth Circuit found that time required to be spent on off-shore oil barges was not compensable. Rousseau v. Teledyne Mobile

Offshore, Inc. 805 F.2d 1245 (5th Cir. 1986) (affirmed grant of judgment notwithstanding the verdict in favor of employer). Employees worked on a "hitch" basis spending seven days on the ship and then seven days off. Id. at 1247. During their seven days on, the employees could not leave the barge even when not actively engaged in work. Id. However, the employees were compensated only for time spent in actual work. Id. The court found that this arrangement was part of the employment agreement and evidence of continued employment was evidence of an implied agreement to the terms of employment. Id. at 1248.

To determine whether the time spent on the barge was compensable, the court looked to "the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the

employee is subject to call, without being required to work." Id. These employees were free to sleep, eat, watch television, watch taped movies, play ping-pong, or cards, read, listen to music, and so on. They seldom did little physical work while on the barge except during their regularly scheduled hours and if they did so, they were compensated. Id. Based on these facts, the Court upheld the district court's conclusion that time spend on the barge not actively engaged in work was not compensable. Id. at 1249.

In 1987, the Fifth Circuit again faced the issue -- this time in relation to employees at satellite pumping stations who were required to be on-call while waiting in their private residences. Brock v. El Paso Natural Gas Co., 826 F.2d 369 (1987) (reversed a grant of summary judgment for the employees). Only one employee each night

was required to be "on-call" and the employees were given wide latitude among themselves in determining who would be on-call. Id. at 370. Further, the on-call employee was able to engage in personal activities and the policy of not compensating employees for on-call time was part of the working agreement between the company and the employees. Id. at 373-74. The court found that this on-call time was primarily for the employees' benefit, that they were merely waiting to be engaged, and thus the time was not compensable. Id. at 375.

In 1989 the court found that summary judgment could not be granted for an employer because a factual dispute existed concerning the nature of the on-call time. Bright v. Houston Northwest Medical Center, 888 F.2d 1059 (5th Cir. 1989), rehearing granted, 898 F.2d 968 (1990) Bright, a biomedical technician, was required to be

on-call twenty-four hours a day, 365 days a year, wear a pager and be able to reach the hospital within twenty minutes of receiving a call. Id. at 1060. He was not compensated for the on-call time but only for time spent responding to a call. Northwest argued that it had entered into no agreement to pay Bright for on-call time and thus, it was not compensable. Id. at 1061. However, the court noted that lack of an agreement does not end the inquiry. Id. The Court remanded the case for trial because a jury could conclude that Bright was unable to use the time effectively for his or her own purposes. Id. Bright had given up part-time employment, college classes, and traveling. He was unable to divide his on-call time with any other employee.

Most recently, in Mireles v. Frio Foods, Inc., 899 F.2d 1407 (1990) the Fifth Circuit found that factory employees who were

required to report to work and sign in but were not compensated for their time until they could be engaged in work, were entitled to compensation. The employees were required to wait on the premises to be engaged in work and thus should be compensated because the time spent was primarily for the benefit of the employer. Id. at 1412.

The Tenth Circuit in Boehm v. Kansas City Power and Light Co., 868 F.2d 1182 (1989) also found that on-call time was not compensable. The employees were linemen for a power company and during emergencies were required to work overtime. In 1983, the company instituted a formal call-out policy which required the employees to be reachable and to accept call-outs approximately one-third of the time that they were called, or face progressive discipline. Call-outs were not counted if the employees was excused, or ill. Only one call-out was

counted during a weekend or adjacent holiday. The linemen were permitted to leave an alternative number where they could be reached. The employees sought compensation for essentially all the time each week beyond their forty hour work week. Id. at 1184. The court found that the on-call time was not compensable because

> although plaintiffs spent some time at home that they otherwise would not have spent because of the company's on-call policy, defendant's call-out policy as written and as applied was not so restrictive that a jury reasonably could conclude that the time was spent predominantly for the employer's benefit. Plaintiffs were free to leave the company's premises and did so. Plaintiffs were free to use their off-duty time as they wished, provided that they could be contacted and report for work one-third of the time that they were called.

Id. at 1185.

Before analyzing the employees' claims in light of the above case law, this Court must first address the employees' abandonment of certain claims. The employees'

response to the motion for summary judgment, and all the attached affidavits, address only that period of time after the Turnpike changed its discipline policy regarding failure to report for overtime. Specifically, the brief states:

> The point which defense counsel ignores in their argument is that the maintenance employees changed their lifestyles in 1986 to accommodate the Turnpike's new discipline policy.

Employees' response at pg. 27.

> Prior to 1986, maintenance employees were free to leave their homes and to participate in recreational activities in the summer without fear of discipline.
>
> In 1986, the Turnpike adopted a new discipline policy for refusal of, unavailability for, overtime work. As a result, maintenance employees made substantial, and involuntary changes in their life-styles to accommodate the Turnpike. They gave up activities which they engaged in during the summer in order to accommodate the Turnpike.

Employees' response at pg. 30. Thus, it is clear that the employees have abandoned any

claim for back pay before the imposition of the new disciplinary policy. The failure to respond to the motion for summary judgment alone is sufficient to warrant its grant. See, Federal Rule of Civil Procedure 41 and Celotex, 477 U.S. 317.

The Turnpike has presented competent evidence which shows that while on-call but off duty, the employees engage in a variety of activities designed for their own personal benefit and not for the benefit of the Turnpike. Further, no one employee is subject to being called every day of the year; those subject to call rotate between the A and the B crews and amongst those with the least amount of overtime. Employees are able to exempt themselves from being subject to call by taking a vacation day[3] or by seeking to be excused from being called.

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[3] If a vacation day is taken on a Friday, the employee is then excused for the entire weekend.

The depositions of the employees in this case and the requests for admission show that the employees, while not at work, engaged in many activities which were for their and not the Turnpike's benefit. The employees attempt to create material issues of fact by submitting the affidavits of 14 of the 126 plaintiffs in this lawsuit[4]. These affidavits attempt to show that as to these 14 employee their lifestyles changed dramatically after the institution of the disciplinary policy in July 1986. These affidavits contradict their deposition testimony and the admissions in which they stated that they engaged in many recreational activities both before and after July 1986.

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[4]The Turnpike argues, and this Court is inclined to agree, that because no argument was made on behalf of the remaining 112 employees, those employees have essentially abandoned their claims, and by failing to respond to the summary judgment motion, have made entry of judgment against them appropriate. See Celotex, 477 U.S. 317.

This Court is persuaded that the facts of this case unequivocally demonstrate that the employees were waiting to be engaged and were not engaged to wait. The factual pattern presented here is most similar to Rousseau, Brock, and Boehm. Bright, which the employees rely on, is readily distinguishable because Bright was the only employee available and thus, was always the one to be called. There was no opportunity to not be on-call. Mireles is also distinguishable because the employees were required to sign-in and wait on the employer's premises. They were required to wait and be ready to work.

Here, the employees are able to leave and engage in numerous activities for their own benefit. The employees have not shown that the policy as applied results in numerous disciplinary actions or that they are not able to effectively be excused on the

weekends. Further, the requirement to be on-call has always been part of the employment agreement and thus, the employees have consented to it.

Accordingly, this Court finds that the motion for summary judgment is well taken. The employees have abandoned their claim to compensation for the period prior to July 1986; all but 14 have abandoned their claims to compensation after July, 1986; and the 14 who submitted affidavits have failed to create an issue of fact concerning for whose benefit their on-call time was used.

In conclusion, the Court grants judgment in favor of the Turnpike as to the employees' first claim. The parties are ordered to appear for a status call with the Court on October 22, 1990 at 4:00 p.m. Counsel should appear with a party, or a party's representative, who has authority to

settle the remaining issues in the case.

IT IS SO ORDERED.

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed August 20, 1992)

Nos. 91-3807/3838

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARSHALL MARTIN, JR., ON BEHALF OF HIMSELF AND ALL OTHER EMPLOYEES OF THE OHIO TURNPIKE COMMISSION SIMILARLY SITUATED, ET AL.,	)	
Plaintiffs-Appellants,	)	
v.	)	ORDER
OHIO TURNPIKE COMMISSION,	)	
Defendant-Appellee.	)	

BEFORE: GUY AND BOGGS, Circuit Judges; and RONEY,* United States Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having

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*Hon. Paul H. Roney sitting by designation from the Eleventh Circuit

been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Fair Labor Standards Act
Section 207
29 U.S.C. §207

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek

is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) of this section by

employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed--

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and

shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk

distribution of petroleum products if--

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of

fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub. L. 93-259, Apr. 8, 1974.

(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the

employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in

appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day of workweek because such hours are hours worked in excess of eight in a day or in excess of the

maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not

exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

(f) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum

hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection--

(1) in the case of an employee employed

at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of

overtime premiums, in the particular work over a representative period of time;
and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess

of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection

(a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work,a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive

days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if such employee--

(1) is employed by such employer--

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or

in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handing, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not

less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and

(2) if employment in such activities is not part of such employee's regular employment.

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher.

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable

period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection--

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p)(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and

who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-- time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for

another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is--

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

Fair Labor Standards Act
Section 16(b)
29 U.S.C. §216(b)

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public

agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further

delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

Rule 56 of the Federal Rules of Civil Procedure

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days

before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel,

shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all

papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit

facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

No. 92-846

Supreme Court, U.S.
FILED
DEC 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1992

MARSHALL MARTIN, JR., On Behalf of Himself and all other Employees of the Ohio Turnpike Commission similarly situated, *et al.*,
Petitioners,

vs.

OHIO TURNPIKE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the U.S. Court of Appeals for the Sixth Circuit applied the proper legal standard under Rule 56 of the Federal Rules of Civil Procedure in affirming the grant of summary judgment in favor of the employer in a claim for overtime compensation under the Fair Labor Standards Act of 1938.

II. Whether employees seeking compensation under the Fair Labor Standards Act of 1938 for time spent "on call" while away from the employer's premises failed to come forward with specific, significantly probative evidence to support their claim under well-established Supreme Court precedent consistently applied by United States Courts of Appeals.

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No. 92-846

IN THE

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October Term, 1992

MARSHALL MARTIN, JR., On Behalf of Himself and all other Employees of the Ohio Turnpike Commission similarly situated, *et al.*,
Petitioners,

vs.

OHIO TURNPIKE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This action was brought by 125 present and former maintenance employees ("Petitioners") of Respondent, the Ohio Turnpike Commission ("Turnpike"), pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. §201 *et seq.*, ("FLSA"). In their relevant claim, Petitioners seek to recover overtime compensation for time spent "on call" off the Turnpike's premises for unscheduled overtime necessitated by emergencies and weather conditions. Petitioners contend that as a result of the Turnpike's on-call policy, all hours which they spend at home, working at other jobs, driving to and from work, hunting, fishing, socializing, going to concerts, attending church, dating, dining out, and a myriad of other personal activities constitute "hours worked" within the meaning of the FLSA for which they should be compensated.

On Motion for Summary Judgment by the Turnpike, the trial Court found that the on-call time at issue was not compensable under the FLSA because during that time the employees could engage in a variety of activities designed for their personal benefit and not for the benefit of the Turnpike (Memorandum and Order of District Court at 14; *See* Petitioners' Petition for a Writ of Certiorari (hereinafter "Petition") at A49). The trial Court further found that "the requirement to be on-call had always been part of the [collective bargaining] agreement and thus, the employees have consented to it" (*Id.* at 16; Petition at A52).

On Petitioners' appeal, the Sixth Circuit, following the standard for compensability of on-call time clearly established by this Court and consistently followed by other courts, also ruled that the on-call time was not compensable under the FLSA. Specifically, the Court

ruled that the Turnpike's on-call policy was not "so onerous as to prevent [Petitioners] from effectively using their free time for personal pursuits." *Martin v. Ohio Turnpike Comm'n*, 968 F.2d 606, 611 (6th Cir. 1992). Because the record established that the Turnpike's on-call policy was not "especially burdensome" and because Petitioners had admitted that they participated in "numerous activities" while on call, thereby "preclud[ing] a finding that [Petitioners] are unable to use their time for their own pursuits," summary judgment in favor of the Turnpike was appropriate. *Id.* at 612. The Sixth Circuit then denied Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc*.

Petitioners now seek to overturn the Sixth Circuit Court of Appeals' affirmance of the District Court's grant of the Turnpike's Motion for Summary Judgment. Review by this Court, however, is unwarranted. The Court of Appeals below followed this Court's well-established precedent in determining the standard under which on-call time is compensable. The standard enunciated by the Sixth Circuit, moreover, is identical to the standard applied by all other United States Courts of Appeals which have spoken on the issue.

The Turnpike, a 241-mile limited access highway, employs approximately 300 maintenance workers, each assigned to one of eight maintenance and two Division Headquarters buildings located approximately 30 miles apart along the highway. Petitioners are former and present maintenance employees from all eight maintenance buildings and one of the Division Headquarters buildings.

During the relevant period, from January 1, 1986, to March 10, 1989, the maintenance employees' terms and conditions of employment were governed by a collective

bargaining agreement between the Turnpike and Local 1283 of the Laborers' International Union of North America. Maintenance employees work an eight-hour shift, five days per week, for which they are paid their straight time rate. Maintenance employees are also expected, as a condition of employment, to work scheduled and unscheduled overtime.

The collective bargaining agreement recognizes that the nature of the Turnpike's operation and weather conditions will require occasional emergency maintenance work and sets forth the agreement between the Turnpike and the union regarding overtime hours. In its pertinent parts, Section 3 provides: "Every effort will be made to keep overtime work to a minimum"; employees are entitled to pay for overtime work at a rate of one and one-half times their regular rate; all employees "shall work overtime when required"; overtime rosters shall be kept in conspicuous locations for the purpose of equalization of overtime; unless approved or excused, "refusal of or unavailability for overtime work shall be deemed sufficient cause for disciplinary action including dismissal"; and the disciplinary action taken will be determined by taking into consideration the reasons for the refusal, and if the employee is unavailable because of prior commitment such as a doctor or dentist appointment, no disciplinary action will be taken. The imposition of discipline under these provisions can be challenged under the grievance procedure contained in Section 17 of the collective bargaining agreement.

In addition to the above, maintenance employees are also informed of their specific responsibilities in: (1) safety meetings conducted by the foreman, which generally occur every six weeks to two months; (2) annual snow and ice control meetings conducted by the maintenance superintendent at each maintenance building; and, occasionally, (3) posted memoranda.

As stated previously, maintenance employees are expected to work scheduled and unscheduled overtime. Scheduled overtime may be required as a continuation of an employee's regular shift or at other times when the need for overtime work is apparent in advance. Unscheduled overtime is required when emergencies arise, such as a traffic accident, damage to Turnpike property (*e.g.*, a bridge, toll booth, median, etc.) or problems caused by weather conditions (usually snow and ice control). Since the Turnpike operates 24 hours a day, maintenance employees are required to be available to work unscheduled overtime to deal with emergencies as they arise.

Maintenance employees are not required to remain in any one place to "be available" for unscheduled overtime, but rather may make themselves available in any number of ways at the individual employee's option: leaving a telephone number(s) where he/she can be reached, calling the Turnpike to inquire if overtime work will be needed or using a pager. The Turnpike does not dictate how an employee chooses to make himself/herself available for overtime work and will accept collect calls from employees checking to see if they are needed for overtime work. Maintenance employees are always paid time and one half for hours worked in excess of 40 hours per week during which they render services on Turnpike property, regardless of whether those hours were scheduled or unscheduled overtime. Any employee who is released and then called back to Turnpike premises is paid time and a half for one hour of travel time and a minimum of three hours, even if he or she works less than three hours. In addition, employees who work on Saturday or Sunday are paid time and a half even if they did not work 40 hours during the week.

The procedure for "calling out" employees for unscheduled overtime varies according to the time of the year. In general, the maintenance building foreman tells the custodian how many and what types of employees will be needed for the work at hand. The custodian consults the overtime roster and begins calling the employees with the lowest number of overtime hours to date, in accordance with the equalization of overtime provisions in the collective bargaining agreement.[1] Three calls are made to the telephone number dictated by the employee, with the third call placed through the operator to ensure that the employee's telephone is working. Each call and the result thereof is recorded in the custodian's log. These calls are placed at intervals varying in length according to the urgency of the work to be done.

At all relevant times, the maintenance employees have been divided into A and B crews for overtime work. Under the A and B crew system, the maintenance employees (excluding custodians and section clerks) are evenly divided into separate crews designated as "A" or "B." These two crews then alternate periods of time during which they are responsible for overtime work. Winter A and B crews (October 1 to April 30) have been used by the Turnpike for many years. During the winter months, the maintenance employees work their regular shifts until a storm hits. At that time, the A and B crews begin alternating 12-hour shifts, with one crew working midnight to noon and the other crew working noon to midnight.[2] Within the crew that is "on," the low

[1] An exception to this general practice may be made if a particular skill is required and the lowest employees on the overtime roster do not possess that skill.

[2] For instance, at 10:00 a.m., all maintenance employees would be working their regular shift (8:00 a.m. to 4:00 p.m.). If a storm hits, the crew assigned to work the noon to midnight shift is sent home at noon to rest, attend to personal matters, or do whatever they may

(Footnote continued on following page.)

employees on the overtime roster for that crew are called to meet the Turnpike's overtime needs. The employees on the "off" crew are not called except in a dire emergency which requires more manpower than can be assembled from the "on" crew. When the storm abates, both crews return to their normal shifts.

Summer A and B crews operate differently than winter A and B crews. During the summer months, the employees are divided into A and B crews and alternate in two-week periods of "primary" and "secondary" responsibility for all overtime work. As with winter A and B crews, employees on the "off" crew are called only if the Turnpike's overtime needs cannot be met by the "on" crew.

Once an employee is contacted to report for overtime work, he is expected to arrive at the assigned time (immediately in the case of a present emergency or at a scheduled hour when, for instance, a storm is predicted). There is no designated period within which an employee must arrive at the Turnpike after receiving a call to report to work, since the employees may not be at home and are often located at varying distances from work. Depending on the urgency of the situation, the custodian may need to call another employee if the first employee contacted is too far away to be of assistance.

(Footnote continued from preceding page.)

wish until 4:00 p.m. These employees receive one hour of travel time pay at time and a half, even though the travel occurs during their regular work day. The balance of the maintenance employees, the midnight to noon crew, finishes its normal shift of 8:00 a.m. to 4:00 p.m. They are then relieved at 4:00 p.m. by the first crew, which works until midnight. At that time, the midnight to noon crew returns and 12-hour shifts continue until the emergency ends.

Employees may be excused from their responsibility to be available for overtime work by obtaining permission from their foreman in advance. Each request to be excused is evaluated individually, depending on the reason presented, fairness to other employees by allowing different employees to be excused and the foreman's responsibility to ensure that a crew can be assembled if an emergency arises. Maintenance employees are informed of the procedures for obtaining an excuse at snow and ice meetings and safety meetings.

Pursuant to the terms of the collective bargaining agreement, employees who are unavailable for overtime (those who cannot be reached) or who refuse to report for overtime work and who were not excused are subject to discipline. In 1984 and 1985, the discipline depended upon the number of times an employee was unavailable for or refused overtime in a 90-day period. After the first two instances of unavailability/refusal, the employee received a letter of reprimand. After the third instance, the employee received a second letter of reprimand or a suspension, depending on the facts of the individual case. Discipline for infractions beyond the third was also decided on an individual basis.

In July, 1986, the discipline policy for unavailability for/refusal of overtime changed to a five-step progression based upon the number of infractions in a one-year period: first infraction—verbal warning; second infraction—written reprimand; third infraction—one day suspension; fourth infraction—three day suspension; and fifth infraction—termination.[3] This modification

[3] Only two petitioners, plaintiffs John Gallagher and Mark Kinzer, have been terminated for five instances of unavailability/refusal of overtime. On January 9, 1987, Mr. Gallagher and Mr. Kinzer were asked to work overtime after their regular shift. Mr. Gallagher

(Footnote continued on following page.)

was effected at the behest of the Petitioners' union representative, who requested that the unavailability/refusal of overtime policy be made consistent with the tardiness policy. It was intended to standardize the disciplinary steps so the employees would know what discipline would be imposed for a particular infraction. As noted previously, the discipline imposed for an infraction of the overtime policy is subject to dispute by the maintenance employees through the grievance procedure. The evidence establishes that *no one has ever been terminated on the exclusive grounds of being unavailable under the on-call policy.* When grievances are filed over disciplinary actions imposed under the five-step unavailability for or refusal of overtime progression, the Turnpike reviews the individual circumstances and takes into account extenuating factors.

(Footnote continued from preceding page.)

refused to do so, stating he felt sick. Mr. Kinzer did not stay because he had ridden to work with Mr. Gallagher. Mr. Gallagher was given the opportunity to substantiate his claim that he was sick, but failed to do so. Both employees were then terminated because these refusals were the fifth instances of unavailability or refusal within one year. Both employees filed grievances and were subsequently reinstated without back pay as a result of settlement discussions between the Turnpike and the employees' representatives.

SUMMARY OF ARGUMENT

Petitioners have failed to identify a conflict in the United States Courts of Appeals, have raised no novel issue of law, and have advanced no argument for the extension of existing substantive law applicable to summary judgment and the compensability of on-call time.

The burden of the party opposing summary judgment has been clearly defined by this Court, and lower courts have had no difficulty applying it. Similarly, the issue of whether time spent by Petitioners on call is compensable under the FLSA is not an issue which warrants review by this Court. The Courts of Appeals have followed this Court's well-established standard for summary judgment and have consistently held that on-call time is compensable only when the employee cannot use the time effectively for his or her own purposes. Moreover, this Court has determined that this is a fact-intensive inquiry most appropriate for trial courts.

Petitioners are merely dissatisfied with the District Court's and Court of Appeals' application of the well-settled standards for summary judgment and the compensability of on-call time. There is no reason for this Court to revisit standards which it has clearly set forth, have been consistently followed, and were properly applied by the courts below.

REASONS FOR DENYING THE WRIT

I. This Court Has Clearly Established The Legal Standard For Summary Judgment Under Rule 56 Of The Federal Rules Of Civil Procedure: Summary Judgment Is Appropriate Where The Party Opposing Summary Judgment Fails To Come Forward With Specific, Significantly Probative Evidence Sufficient To Establish The Existence Of An Element Essential To That Party's Case And On Which That Party Bears The Burden Of Proof. The Sixth Circuit Court Of Appeals Properly Applied This Well-Settled Standard.

Petitioners misunderstand both the legal standard for summary judgment and their specific burden in opposing a motion for summary judgment. Contrary to Petitioners' contentions, the summary judgment standard has been clearly defined by this Court in a series of decisions construing Rule 56 of the Federal Rules of Civil Procedure and there is no need for this Court to revisit this issue.

Rule 56(c) of the Federal Rules of Civil Procedure in relevant part provides that summary judgment shall be rendered if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The application of this standard was explained in *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), where this Court ruled that:

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who *fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of*

> *proof at trial.* In such a situation, there can be "no genuine issue as to any material fact," since *a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.* The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof . . . (Emphasis added).

Indeed, in *Celotex, supra,* this Court made clear summary judgment is a *favored* method of case disposition in appropriate circumstances, emphasizing that "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and . . . it should be interpreted in a way that allows it to accomplish this purpose." 477 U.S. at 323-24. Noting that summary judgment had been authorized by the Federal Rules of Civil Procedure for almost 50 years, this Court stated:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis. *Id.* at 327.

The "genuine issue as to any material fact" language of Rule 56 was then interpreted by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), decided the same day as *Celotex*. Recognizing that the very language of Rule 56 provides that the "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment," this Court held that the *substantive law* of the cause of action at issue "will identify which facts are material." 477 U.S. at 247-48 (emphasis in original). It explained:

> Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Factual disputes that are irrelevant or unnecessary will not be counted.* See generally 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, *it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Id.* at 248 (Emphasis added).

This Court went on to explain that a dispute about a material fact is "genuine" for purposes of Rule 56 "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* A court's function under Rule 56 is not to weigh the evidence and determine the truth of the matter, but to determine whether there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* at 249. If the evidence is "merely colorable . . . or is not significantly probative," summary judgment is appropriate. *Id.* at 249-50.

In *Anderson, supra,* this Court made it very clear that the standard under Rule 56 is the same as the standard for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. That is, "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." 477 U.S. at 250, citing *Brady v. Southern R. Co.,* 320 U.S. 476, 88 L. Ed. 239, 64 S. Ct. 232 (1943). As emphasized by this Court in *Anderson,* this is a well-established standard:

> As the Court long ago said in *Improvement Co. v. Munson,* 14 Wall. 442, 448 (1872), and has several times repeated:
>
> > Nor are judges any longer required to submit a question to a jury merely because *some* evidence has been introduced by the party having the burden of proof, *unless the evidence is of such a character* that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there *is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it,* upon whom the *onus* of proof is imposed. (Footnotes omitted.)
>
> See also *Pleasants v. Fant,* 22 Wall. 116, 120-121 (1875); *Coughran v. Bigelow,* 164 U.S. 301, 307 (1896); *Pennsylvania R. Co. v. Chamberlain,* 288 U.S. 333, 343 (1933). 477 U.S. at 251 (Emphasis added).

See also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), decided shortly before *Anderson*

and *Celotex* (holding that even a complex antitrust case may be resolved at the summary judgment stage because there is no genuine issue for trial "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party").

Petitioners urge this Court to revisit these principles due to an alleged inconsistency between what the Petitioners call this Court's "verbiage" of (1) directing trial courts "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial," *Anderson, supra,* 477 U.S. at 249; and (2) requiring the courts to "bear in mind the actual quantum and quality of proof necessary to support liability" under the governing law. *Id.* at 254. Petition at 14. As shown above, however, there is no inconsistency between these directives: a court could not make a determination of the existence of a genuine issue of material fact without reference to the proof necessary to establish the elements under the substantive law. *Anderson* at 248. Petitioners offer no authority questioning the vitality of *Anderson*, nor do they advance a logical explanation for their misreading of *Anderson.* Although they seek a clarification of the *Anderson* decision, Petitioners fail to establish that lower courts have had any difficulty in applying its holding, nor that there is a split in the Courts of Appeals in construing the summary judgment standard.

Moreover, Petitioners ignore that this Court *has* recently further elaborated on the standard for summary judgment under Rule 56(c) and, instead of questioning the continuing vitality of its 1986 decisions, this Court has reiterated their holdings. Specifically, in *Lujan v. National Wildlife Federation,* 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990), this Court reiterated its

holding in *Celotex, supra*, that under Rule 56 a moving party need not negate the elements of the nonmovant's case. Further, *Lujan* repudiates Petitioners' very contention: Resolving factual issues of controversy in favor of the non-moving party

> is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint. . . . Rule 56(e) provides that judgment "shall be entered" against the nonmoving party unless affidavits or other evidence "set forth specific facts showing there is a genuine issue for trial." The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. *Lujan*, 497 U.S. at _____, 110 S. Ct. at 3188, *citing Anderson, supra*, 477 U.S. at 249.

This Court went on to hold that the district court had properly entered summary judgment in favor of the defendants because the evidence offered by the plaintiffs failed, as a matter of law, to establish the essential elements of their case upon which they bear the burden of proof.

In sum, the essence of Petitioners' claim is that the Court of Appeals in this case made inappropriate "factual findings" and "improperly weighed" certain evidence offered in opposition to the Turnpike's Motion for Summary Judgment. Petition at 16-21. As more fully discussed below in Section II, Petitioners' contention is both legally and factually unfounded. The only determination made by the Court of Appeals was that there is no genuine issue as to a material fact within the meaning of *Celotex, supra, Anderson, supra* and *Matsushita, supra*. Concluding that Petitioners had failed to raise a genuine issue of material fact, the Court of Appeals properly affirmed the District Court's entry of summary judgment.

II. The Court Of Appeals Correctly Ruled That, Under Well-Established Supreme Court Precedent Consistently Applied By Courts Of Appeals, The Time Spent By Petitioners While On Call Is Not Compensable Under The FLSA Because During This Time They Engage In Activities Which Are Predominantly For Their Personal Benefit And Not For The Benefit Of Their Employer.

Petitioners seek to have this Court review an issue it settled long ago by adopting a standard for the compensability of on-call time which has since been consistently applied by the United States Courts of Appeals. That issue is whether the hours spent by Petitioners off the Turnpike's premises after their regular shift and during which they might be called to return for overtime work constitute "hours worked" within the meaning of the FLSA. Petitioners contend that, under the FLSA, they are entitled to time and a half for 16 hours per weekday, 24 hours per day on weekends or holidays, 365 days a year, excluding only those hours during which they are unavailable due to illness, vacation and other excusable reasons. The applicable law, as defined by this Court and all seven federal Courts of Appeals which have reached the issue, establishes that the Sixth Circuit Court of Appeals in this case properly applied the appropriate standard for compensability of on-call time, and that Petitioners' claim for overtime compensation need not be reviewed by this Court.

The overtime provision of the FLSA, Section 7(a)(1), 29 U.S.C. §207(a)(1), provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the

> production of goods for commerce, for a workweek longer than forty hours unless such employee received compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §203(g) defines "employ" as "includ[ing] to suffer or permit to work."

In *Armour & Co. v. Wantock*, 323 U.S. 126, 89 L. Ed. 118, 65 S. Ct. 165 (1944), *reh'g denied*, 323 U.S. 818 (1945), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161 (1944), this Court long ago set forth the standard under which time spent by employees subject to being called to work by their employer is compensable under the FLSA. Specifically, this Court determined on-call time is compensable only if the time is spent predominantly for the employer's benefit, and not for the employee's. *Armour*, 323 U.S. at 133. At the same time, this Court wisely declined to announce a strict legal formula for determining the compensability of on-call time. Rather, this Court held that the determination "is a question dependent upon all the circumstances of the case." *Id.* In *Skidmore*, this Court then recognized that the issue of compensability

> involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all the surrounding circumstances. . . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was. 323 U.S. at 137.

In other words, the facts "may show that the employee was engaged to wait, or they may show that he waited to be engaged." *Skidmore* at 137.

In *Armour, supra*, members of the employer's private fire-fighting force were required to remain at the plant after their regularly scheduled nine-hour shift. During the remaining 15 hours of the day, the employees were free to cook, sleep and otherwise amuse themselves within the confines of the plant, but had to remain available to respond to any fire alarms or other emergencies. This Court held that just as an employer may hire employees to perform active labor, so may it hire employees to wait in order to ensure instant readiness to serve. 323 U.S. at 133. It affirmed the lower court's finding that the employees who were required to remain at the plant had been hired to work, that work consisting of waiting.

Addressing facts which were virtually identical to those in *Armour, supra*, this Court held in *Skidmore* that the trial court had erred in ruling that waiting time could never constitute "hours worked." 323 U.S. at 140. Relying on *Armour*, this Court remanded the employees' claim for determination by the trial court under the proper legal standard. *Id.*

The standard set forth in *Armour, supra*, and *Skidmore, supra*, has been further illustrated by the U.S. Department of Labor, which is charged with the enforcement and administration of the FLSA, and further defined by federal courts. The Secretary of Labor's Interpretive Bulletin No. 13, issued on January 1 1961, and published at 29 C.F.R. §785.17, states:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." *An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with*

> *company officials where he may be reached is not working while on call.* (Citations omitted) (Emphasis added).

The Interpretive Bulletin then continues: "Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked." 29 C.F.R. §785.16. While not controlling, the Secretary of Labor's interpretations of the FLSA are entitled to great weight. *Skidmore* at 139-40.

Contrary to Petitioners' assertions, following *Skidmore, supra, Armour, supra,* and the Secretary of Labor's interpretations, the United States Courts of Appeals which have been presented with claims similar to Petitioners' claim have *consistently* ruled that such on-call hours are spent predominantly for the employees' benefit and, therefore, are not compensable under the FLSA.

For example, the Ninth Circuit has most recently spoken on the issue, utilizing a standard identical to that employed by the Sixth Circuit in this case. *Owens v. Local No. 169, Ass'n of Western Pulp and Paper Workers,* 971 F.2d 347 (9th Cir. 1992). The plaintiffs in *Owens* were mechanics at a pulp mill who worked regular daytime shifts. Because the mill operated 24 hours a day, the mechanics were expected to return to work to make emergency repairs on their off hours. Employees were subject to the call-in policy during all times they were not actively working, except for vacation periods. *Id.* at 349. Like the Turnpike, the mill developed rosters. Under the roster system, mechanics who had recently accepted a call-in were placed at the bottom of the week's call-in list. Mechanics who had not accepted a call-in for some time were most likely to be called. Mechanics were permitted to leave forwarding numbers, and those at the

top of the roster could request pagers. On average, mechanics accepted call-ins six times per year. Discipline was imposed upon mechanics who did not accept a fair share of their calls. *Id.*

The Ninth Circuit properly determined the standard for the compensability of on-call time is whether "the employee is unable to use the time effectively for his own purposes." *Owens, supra,* at 350. Under these facts, the Ninth Circuit ruled that judgment for the employer "is not only warranted, but compelled." *Id.* at 356.

Similarly, in *Birdwell v. City of Gadsden,* 970 F.2d 802 (11th Cir. 1992), the Eleventh Circuit held that a directed verdict should have been entered in favor of the employer. In *Birdwell,* plain clothes detectives claimed they should have been compensated for time spent on call. Specifically, the police force Captain had issued a directive requiring that the detectives leave a phone number where they could be contacted and that they be prepared to report for duty immediately when called. The detectives could not leave home unless they left a forwarding number or owned a beeper; detectives not owning beepers were severely limited in the activities in which they could participate; and the detectives could not drink alcohol. *Id.* at 808. The Eleventh Circuit concluded that the "on-call time was not spent predominantly for the employer's benefit" because several detectives had worked a second job while on call, none of the detectives claimed they could not use their time at home as they wished, they could leave home merely by leaving a forwarding number or purchasing a beeper, and they were infrequently called. *Id.* at 808, 810. The Court concluded: "They could do anything they normally did so long as they were able to respond to a call promptly and sober." *Id.* at 810.

Employing the same standard, the Fifth Circuit has consistently ruled in favor of the employer when the employees could effectively use the on-call time for their own purposes. For instance, in *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (1991), *cert. denied*, _____ U.S. _____, 112 S. Ct. 882 (1992), the *en banc* Fifth Circuit upheld a district court's entry of summary judgment in favor of the employer in a case involving a biomedical technician who was required to wear a pager to be available every day and night within 20 minutes to repair equipment. He was the only on-call employee and therefore had no reprieve from being on call. He was compensated for four hours each time he was called, but was not paid for other on-call time. 934 F.2d at 673, 679. Because the plaintiff's deposition testimony showed that during his on-call time he could watch television, shop at the supermarket and mall, and dine out, *id.* at 676, the Court determined that "the undisputed facts show that the on-call time is not working time." *Id.* at 675. *See also Halferty v. Pulse Drug Co.*, 864 F.2d 1185 (5th Cir. 1989) (on-call time not compensable where telephone dispatcher answered calls from her home for an ambulance service from 5:00 p.m. to 8:00 a.m. because she only actually answered a few calls per night and could pursue personal, social and business activities while on call, including eating, sleeping, watching television, entertaining guests, babysitting and doing laundry); *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369 (5th Cir. 1987) (on-call time not compensable where each evening one employee of a rural gas pipeline company satellite station was required to remain at home to hear an emergency alarm because the alarms were infrequent, on-call duty usually did not interfere with the normal activities in and around the home such as eating, sleeping, entertaining guests and

watching television, employees could trade their on-call responsibilities, and employees not on call could leave the site at will); and *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987) (time of offshore oil derrick barge employees not compensable because, even though during off hours employees were required to remain on the barge, the employees were free to sleep, eat, watch television, watch VCR movies, play ping pong or cards, and engage in a variety of other activities; summary judgment against the employees was therefore appropriate).

The Fourth Circuit has also reached the same conclusion on this issue. In *Kelly v. Hines-Rinaldi Funeral Home, Inc.*, 847 F.2d 147 (4th Cir. 1988), *cert. denied*, 493 U.S. 835 (1989), a housekeeper performed light cleaning duties at a funeral home between 9:00 p.m. and midnight and between 6:30 a.m. and 8:30 a.m. He slept on the premises between shifts and was required to answer the phone (about three times per month) and retrieve a corpse when necessary (about twice per month). In affirming the trial court's summary judgment in favor of the employer, the Fourth Circuit rested its decision on "practical considerations": an overwhelming amount of the night hours was available for the employee's uninterrupted use in his apartment, which was usually spent sleeping; the employee was very rarely called upon to perform duties during his off hours; and it was "not realistic to assume that [the employer] would employ someone for 69 hours per week, thereby incurring large overtime expense, to perform the tasks assigned to Kelly." 847 F.2d at 148. The Court in *Kelly* noted that the frequency of the interruptions as a significant factor had been acknowledged by several other Circuits in cases with similar facts.

Utilizing the same standard under three different factual circumstances, the Tenth Circuit has twice held on-call time noncompensable, and once held on-call time compensable. In *Boehm v. Kansas City Power & Light Co.*, 868 F.2d 1182 (10th Cir. 1989), linemen brought an action for all hours in excess of their regular 40-hour work week on the basis that the power company required them to be available to work at least once for every three times they were called. Employees who failed to respond as required were subject to a three-step progressive disciplinary policy culminating in discharge. If an employee missed a call-out because of extenuating circumstances, he could pursue an internal grievance procedure. The employees were permitted to leave an alternate phone number where they might be reached if they were not at their usual telephone number. Relying on its prior decision in *Norton v. Worthen Van Service, Inc.*, 839 F.2d 653 (10th Cir. 1988), the Tenth Circuit ruled that the district court should have granted a directed verdict as to all 200 plaintiffs' overtime claims:

> [W]e conclude that, although plaintiffs spent some time at home that they otherwise would not have spent because of the company's on-call policy, defendant's call-out policy as written and as applied was not so restrictive that a jury reasonably could conclude that the time was spent predominantly for the employer's benefit. Plaintiffs were free to leave the company's premises and did so. Plaintiffs were free to use their off-duty time as they wished, provided that they could be contacted and report for work one-third of the time that they were called. 868 F.2d at 1185.

In *Norton, supra*, the Tenth Circuit had held that truck drivers who were required to respond to telephone calls within 15 to 20 minutes or be subject to discipline were not "working" during the hours between calls

because the drivers spent the time between assignments at friends' homes, at church, at laundromats, at restaurants, at a local gymnasium and pursued hobbies such as working on guns or physical fitness. 839 F.2d at 655.

In contrast, while still employing the standard of whether the employees could effectively use the on-call time for their own purposes, the Tenth Circuit in *Renfro v. City of Emporia*, 948 F.2d 1529 (1991), *cert. dismissed*, _____ U.S. _____, 112 S. Ct. 1310 (1992), determined that firefighters who were subject to call on a rotating basis following a tour of duty were entitled to compensation. The Court found that the nature of the firefighters' on-call status differentiated the case from other on-call cases. Specifically, the Tenth Circuit upheld the district court's determination that the on-call time was compensable "primarily" because of the frequency which the firefighters were actually called. During each 24-hour on-call period, a firefighter could receive as many as 13 calls, and on average received 3 to 5 calls per period. 948 F.2d at 1537. Placing heavy emphasis on the frequency of the callbacks, the Court concluded that the firefighters could not use the time effectively for personal pursuits. *Id.* at 1535.

The Tenth Circuit decisions give a clear illustration of the principle that while different facts of discrete cases may produce different conclusions of law, the same set of facts has to lead to the same *legal* conclusion. *Bright, supra.* Thus, under a given set of undisputed facts, courts may enter summary judgment as a matter of law. *See, e.g., Owens, supra; Bright, supra; Rousseau, supra;* and *Kelly, supra.*

Thus, using the same legal standard, the Eighth Circuit in *Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912 (1991), found that forestry service employees were

unable to use on-call time for their own purposes when they were required to monitor hand-held radios 24 hours per day during on-call periods and were required to respond immediately to emergencies. These requirements, the Court found, restricted the employees' travel, prevented them from participating in activities that would render them unable to hear the radio, forced them to concentrate on the radio at all times, and prevented them from going anywhere radio noise was unwelcome. *Id.* at 916-17.

Having analyzed this substantial body of law, the Sixth Circuit in the instant case agreed with all other Courts of Appeals and determined that on-call time "may be compensable if the restrictions imposed are so onerous as to prevent employees from effectively using the time for personal pursuits." *Martin, supra,* at 611. However, given the facts of this case, the Sixth Circuit determined that the Turnpike's on-call policy was simply not so restrictive as to prevent the Petitioners from making effective use of the time. *Id.* Specifically, the Plaintiffs admitted that while they were on call they: worked at second jobs, played golf, went swimming, performed housework, performed yardwork, entertained at home, watched television, engaged in sporting events outside their homes, visited friends and relatives, shopped, went to church, attended meetings of organizations, went to movies, dined out, and engaged in a myriad of other activities which courts have repeatedly found were for the employee's benefit, not the employer's. Thus, the Turnpike's on-call system was not "so distracting or cumbersome as to seriously inhibit personal activities." *Id.* at 611.

Petitioners' claims before this Court present no novel issue of law and are premised on the false proposition that disputed facts need not be material. First,

Petitioners attempt to draw distinctions between types of on-call cases, characterizing them as "respite" or "no respite" cases. Petition at 28-31. As the discussion *supra* indicates, there is no such dichotomy: the issue of compensability is wholly unrelated to whether the employee receive a period of "respite." Simply stated, the fact that an employee is on call one hour per week or all non-working hours in a week has no bearing on whether the *on-call time* can effectively be used for the employee's purposes. Moreover, courts have found on-call time compensable even where the employees had "respite," *e.g., Renfro, supra,* and have found on-call time non-compensable even where there was no "respite." *E.g., Owens, supra; Bright, supra.*

Second, Petitioners' claim that there is a split in the Circuits because the Fifth and Sixth Circuits have allegedly adopted a "total preclusion" rule is unfounded. As shown above, all Circuits which have reached this issue have used the *same* standard: whether the employees can effectively use the time spent on call for their own purposes. This is precisely what this Court ruled in *Armour, supra,* and *Skidmore, supra.* Ignoring this fact, Petitioners argue that the standard is "not whether the employee's time is pleasurably spent, but whether the employee can spend the time doing what the employee would choose to do *had he been free to chose* [sic]." Petition at 27 (emphasis in original). Petitioners erroneously rely upon *Skidmore,* 323 U.S. at 139, for this proposition. The language cited by Petitioners was not the ruling of this Court, but rather a recitation of the position of the Wage and Hour Administrator in its *amicus* brief. In *Skidmore,* this Court did not embrace the Administrator's position, but rather advised lower courts to accord the Administrator's opinions in individual cases such weight as is indicated based "upon

the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. Thus, the Sixth Circuit in this case, consistent with the decisions of other courts, correctly rejected the standard urged by Petitioners. *Martin, supra*, at 611. *See also Norton, supra*, 839 F.2d at 654 (expressly rejecting the employees' claim that they should be compensated because there were other activities in which they might have engaged); and *Pilkenton v. Appalachian Regional Hospitals*, 336 F. Supp. 334, 338 (W.D. Va. 1971) ("the test is not whether an employee's leisure is curtailed at all, but rather whether it is so restricted that it is not spent primarily for the employee's benefit").

Third, Petitioners claim that the fact that they could have been disciplined for failing to respond to the Turnpike's call to come in to work has legal significance. Petition at 26, 31. Contrary to the Petitioners' contention, most litigated on-call policies provide for the imposition of discipline and this factor has made no difference, *i.e.*, is not a *material* issue. *See, e.g., Owens, supra*, at 349; *Cross, supra*, at 914; *Renfro, supra*, at 1531; *Norton, supra*, at 655; and *Boehm, supra*, at 1183. Petitioners have failed to cite any authority in support of their proposition that the employer's imposition of discipline is a relevant inquiry in determining compensability of overtime. Indeed, none exists. Moreover, maintenance employees may avoid discipline by various means, in addition to taking vacation or when ill: (a) employees may be excused from the responsibility to be available for overtime work by obtaining permission from their foreman in advance; (b) an employee may inform the custodian at any time that he

or she will not be at the phone number previously provided to the custodian and supply a new number for the custodian to call; (c) if the employee does not give the custodian an alternative phone number, he or she can call the custodian to determine whether his or her services would be needed; and (d) employees are permitted to carry a pager. In addition, employees who are on an "off" crew but are called in, as in an extreme emergency, are not subject to discipline even if they are unavailable or refuse to respond to the call.

Fourth, the Petitioners claim that it was improper for the Court below to grant summary judgment because there remained a factual dispute as to whether maintenance employees who carried a pager in order to be called in to work did so at their own risk. Petitioners claim that this issue has a bearing on "the extent of the burden on the employees [sic] private lives by the on-call policy . . ." Petition at 18. This ignores the specific finding of the Court of Appeals that "[t]he fact that employees bore the risk of using pagers does not amount to an interference with the employees' ability to use their free time." *Martin, supra,* at 612. Since the Court did consider the risk of a pager's malfunctioning, Petitioners' contentions on this point are frivolous.

Fifth, Petitioners contend there is a factual issue as to how frequently they were called back to work. In support of their contention, Petitioners refer to the affidavits of two employees, one claiming he was called back "four or five times per week," the other claiming he was called back "often." Petition at 19. Petitioners fail to recognize their burden in opposing a motion for summary judgment. These two allegations, out of a record of about a thousand pages of evidence adduced by Petitioners, do not constitute *sufficient evidence* upon

which a reasonable jury could return a verdict for Petitioners. *See Anderson, supra,* at 249-50; *Lujan, supra,* 497 U.S. at _____, 110 S. Ct. at 3188.

Finally, Petitioners contend that summary judgment was improper because they created an issue of fact concerning the allowed response time when they were called by the Turnpike. Petitioners once again have seized upon a matter that is wholly inconsequential to the legal test for compensability of on-call time. Response time is simply not a *material* fact preventing summary judgment.

As the Fourth, Fifth, Sixth, Ninth and Tenth Circuits have ruled, the determination of whether time spent on call under a particular arrangement is compensable is a fact-intensive inquiry appropriate for disposition by summary judgment. This is totally consistent with this Court's statement in *Skidmore, supra,* that "[f]acts may show that the employee was engaged to wait, or they may show that he waited to be engaged." 323 U.S. at 137. In *Skidmore,* this Court remanded the case to the district court for a factual determination of whether the facts established compensability under the standard just announced. *Id.* at 140. The District Court in this case has already made that determination under the appropriate standard. There is thus no reason to grant the Petition for a Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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